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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 786

JACK SMITH BEVERAGES, INC.,
a Michigan corporation,
Petitioner and Respondent Below,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent and Petitioner Below.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Dated: May 1, 1953.

AMERICAN BRIEF AND RECORD COMPANY, GRAND RAPIDS 2, MICHIGAN

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No. .....

JACK SMITH BEVERAGES, INC.,
a Michigan corporation,
Petitioner and Respondent Below,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent and Petitioner Below.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, Jack Smith Beverages, Inc., a Michigan corporation, respectfully petitions this Honorable Court for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, to review the judgment of said Court entered on February 17, 1953 modifying and partially enforcing an order by the National Labor Relations Board against Jack Smith Beverages, Inc., hereinafter called the "Company".

SUMMARY STATEMENT OF THE MATTER INVOLVED

This is an action by the National Labor Relations Board, hereinafter referred to as the "Board", petitioning the United States Court of Appeals for the Sixth Circuit for

enforcement of an order of the Board directing the Company to disestablish in all three of its branches, and cease and desist from recognizing as representatives of its employees, the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers, of America, AFL, Local No. 164, hereinafter referred to as the "AFL".

Following a petition for recognition as bargaining representatives of Company's employees at its Ypsilanti branch filed by the International Union of the United Brewery, Flour, Cereal, and Soft Drink Distillery Workers, of America, affiliated with the Congress of Industrial Organizations, hereinafter referred to as the "CIO", this Union filed a charge against the Company complaining of unfair labor practices at its Ypsilanti branch, and the 7th Region of the National Labor Relations Board, on the basis of this charge, issued a complaint charging the Company with unfair labor practices at its Ypsilanti branch.

A hearing was held September 5th and 6th, 1950 before a Trial Examiner who in his intermediate report found that the Company was engaged in interstate commerce and had violated Sections 8(a) (1) and 8(a)(2) of the National Labor Relations Act, hereinafter referred to as the "Act", at the Ypsilanti branch, and recommended that the Company be ordered to cease and desist from recognizing the AFL as the bargaining representative of Company's employees *at its Ypsilanti branch.* His findings of fact and conclusions of law were adopted by the National Labor Relations Board and an order was issued June 21, 1951 ordering the Company to —

1. Cease and desist from:

   (a) Recognizing the AFL as the representative of any of its employees at *all* of its branches.

   (b) Performing or giving effect to its contract with the AFL, or any other contract with the AFL.

   (c) Dominating, interfering with or supporting the AFL.

   (d) Soliciting withdrawals of its employees from the CIO.

   (e) In any other manner interfering with or coercing its employees.

2. To take the following affirmative action:

   (a) Withdrawal of all recognition from and complete disestablishment of the AFL as bargaingaining representative at all three of its branches.

   (b) Posting notices of the above.

   (c) Notifying the Board of compliance.

The National Labor Relations Board, on the 17th day of October, 1951, petitioned the United States Court of Appeals for the Sixth Circuit for a decree enforcing its order. Briefs and briefs amicus curae were filed and the court heard oral arguments on the petition on October 9, 1952 (R. 261-265), and on February 17, 1953 filed its opinion and entered judgment modifying the order of the Board *so as to limit the order to the Company's Ypsilanti branch alone* and enforcing the order as modified.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet officially reported, is set forth at R. 261-265. The intermediate report of the Trial Examiner is set forth at R. 45-62. The findings of fact, conclusions of law and order of the Board (R. 67-76) are reported at 94 NLRB 1401.

JURISDICTION

The judgment of the Court of Appeals (R. 261-265) was entered on February 17, 1953. The jurisdiction of this court is invoked under 28 U.S.C. 1254 and Section 10(e) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

The Company is a wholesale beverage distributor, making all of its sales, and overwhelmingly most of its purchases, within the State of Michigan, without any franchise, agreement or other nexus with any interstate commerce enterprise. The Company maintains three indepen-

dent and autonomous branches in three different Counties of the State of Michigan (R. 48-50, 82, 83, 93-97). The acts, events and occurrences complained of all transpired at the Company's Ypsilanti branch and involved only 7 of the 13 men there employed (R. 51-54). At the time of the acts and events complained of the Board had apparently established and asserted a policy of not taking jurisdiction over businesses like the Company's in the absence of a franchise between the business and an interstate enterprise. Subsequent to the hearing before the Trial Examiner the Board, on October 5, 1950, set forth its so-called jurisdictional "yardsticks" and retroactively applied them to assume jurisdiction in this case, using as the sole basis for application of the "yardsticks" the volume of business *done at all three of the Company's branches.* The questions presented are:

1. Whether the Company is engaged in interstate commerce within the meaning of the Act, that is, whether a labor dispute at the Company's Ypsilanti branch had, or might have, such an impact upon interstate commerce so as to justify the assertion of jurisdiction by the Board in its carrying out the purposes and policies of the Act.

2. Whether the Board can establish arbitrary "yardsticks" to determine the jurisdictional question without an examination of the facts of each case and apply those "yardsticks" retroactively to assume jurisdiction over an employer who had acted in reliance upon the Board's previously established policy of not taking jurisdiction over its type of business.

3. Whether the volume of business done at all three of the Company's independent branches could be totaled in order to acquire jurisdiction over this employer to settle a labor dispute not affecting the other two branches, when its order must be limited to the one branch involved.

4. Whether a decision of a Circuit Court of Appeals that does not discuss or expressly determine one of the material issues before it, and seemingly makes reference to testimony not in the record, should in the exercise of its supervisory power, be reviewed by the Supreme Court of the United States.

STATUTE AND CONSTITUTIONAL PROVISION INVOLVED

Clause 3 of Section 8 of Article I of the Constitution of the United States, and Section 1 and Section 2 (6)(7) of the National Labor Relations Act, as amended, (29 U.S.C. 151, 49 Stat. 449, as amended, 29 U.S.C. 152, 49 Stat. 450, as amnded) are principally involved. This constitutional provision and section of the Act are set out in the Appendix, infra page 17-19.

STATEMENT OF THE CASE

The Company, a wholesale beverage distributor, maintains its principal place of business in the City of Jackson, Jackson County, Michigan, and branch offices and warehouses at Ypsilanti, Michigan, in Washtenaw County, and Adrian, Michigan, in Lenawee County (R. 48, 83).

All of the Company's sales are made in the State of Michigan on the wholesale level (R. 84) and an overwhelming majority of its purchases are made in the State of Michigan (R. 48-50, 83, 93-97, 100). All of the acts complained of in this case occurred at the Company's Ypsilanti branch and all of the employees involved were there employed (R. 51-54, 100-113, 264). The Company's Ypsilanti branch, like the Company's other branches, has its own manager, who hires and fires employees for that branch and supervises and directs their work (R. 156, 177, 214). The Ypsilanti branch, like the others, maintains its own vehicle fleet.

The proceedings in this case commended with a petition by the CIO to the Seventh Region of the National Labor Relations Board demanding recognition as bargaining representative for the employees at the Company's Ypsilanti branch only, claiming to have authorization cards from a majority of the 13 men there employed (R. 238-240). A complaint was issued by the Seventh Region directed against the Company for alleged unfair labor practices at its Ypsilanti branch (R. 29-34).

Prior to October, 1949 the representation history at the Company's three branches discloses that they had always been represented individually for bargaining purposes (R. 115).

In the year that the alleged unfair labor practices occurred at the Ypsilanti branch, that branch made all of its sales within the State of Michigan, had no frachise or binding agreement with any interstate enterprise and had a total inflow of out-of-state products of One Hundred Eighty-Nine Thousand Two Hundred sixty-five and 95/100 ($189,265.95) Dollars, less than the $500,000 diacritical amount set forth in the October 5, 1950 "yardsticks." For the first eight months of the year 1950 the purchase of out-of-state products had decreased to One Hundred Fifteen Thousand One Hundred thirty-five and 54/100 ($115,135.54) Dollars (R. 49, 94, 96, 97).

All of the Company's equipment and supplies are purchased within the State of Michigan with the possible exception of an occasional item (R. 89, 90).

Prior to and at the time of the institution of proceedings in this matter the Company had relied upon the advice of counsel that under the then policy of the Board it was not engaged in interstate commerce (R. 137). Despite the fact that the Petition for Recognition and the Charge by the CIO, as well as the Complaint issued by the Seventh Region, were all concerned solely with the Ypsilanti branch, assertion of jurisdiction by the Board was based solely upon the total volume of purchases by all three of the Company's branches and an apparent retroactive application of the jurisdictional "yardsticks" adopted in October of 1950.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

1. Although the jurisdictional issue was presented to the Circuit Court of Appeals, both in Brief and on Argument, this issue was neither discussed nor expressly determined in the opinion of said court. The only language germane to the question appearing in the opinion is as follows:

> "Approximately 31% of its (all three of Company's branches) purchases for the year 1949, which amounted to $1,835,644.04, came from outside of the State of Michigan." (R. 262). (Insert ours).

The failure of the Circuit Court of Appeals to discuss and expressly determine the jurisdictional issue laid before it so far departs from the accepted and usual course of jurisdictional proceedings, or so far sanctions such a departure by a lower court, as to call for an exercise of the Supreme Court's power of supervision.

2. Assuming, as we must in the absence of express judicial determination, that the Circuit Court of Appeals upheld the assertion of jurisdiction over the Company by the Board, we must logically make the further assumption that its decision was based upon the total volume of purchases made at all three of the Company's branches and a retroactive application of the jurisdictional "yardsticks" of October, 1950.

(a) The decision of the Circuit Court of Appeals is internally inconsistent in that it limits the scope of the Board's jurisdiction to issue an order to the Company's Ypsilanti branch and at the same time justifies the assertion of jurisdiction by the Board by totaling the volume of purchases at all three of the Company's branches.

(b) The tacit approval by the Circuit Court of Appeals of the Board's policy of determining the jurisdictional question by the application of arbitrary "yardsticks" without an examination of the pertinent facts of the case before it and the retroactive application of those "yardsticks" involves an important question of Federal law which has not been, but which should be settled by this Honorable Court, and is in conflict with decisions of other Circuit Courts of Appeals. *Joliet Contractors Association, a nonprofit Illinois corporation, for Itself and on Behalf of Its Members, et al, Petitioners, vs. National Labor Relations Board, Respondent* (193 F. (2d) 833) and for the Ninth Circuit and the case of *National Labor Relations Board, Petitioner, vs. Guy F. Atkinson Company and J. A. Jones Construction Company, Respondent* (195 F. (2d) 141), and for the Tenth Circuit and the case of *National Labor Relations Board, Petitioner, vs. Shawnee Milling Company, doing business*

as Pauls Valley Milling Company, Respondent (184 F. (2d) 57).

(c) The decision of the Circuit Court of Appeals in tacitly approving the Board's policy of determining the jurisdictional issue without an examination or consideration of the actual or potential impact upon interstate commerce by the labor controversy at hand, is a decision of a Federal question in a way probably in conflict with applicable decisions of the United States Supreme Court.

3. The decision of the Circuit Court of Appeals, if based upon the testimony of Jack Petty, would be in error since he did not testify in this cause, and the Record contains no testimony of Jack Petty.

4. The great importance of the National Labor Relations Act to the business world and the need of an authoratative and elucidating decision as to the jurisdiction of the National Labor Relations Board, particularly with regard to its establishment and use of arbitrary jurisdictional "yardsticks" and the retroactive application thereof, indicates the granting of Certiorari in this cause.

PRAYER

WHEREFORE, your Petitioner prays that this Petition be granted and that a Writ of Certiorari issue to review this cause and the Judgment of the Circuit Court of Appeals for the Sixth Circuit entered February 17, A.D. 1953.

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Dated: May 1, 1953.

BRIEF

The Opinion Below, Statement of Jurisdiction, The Questions Involved and a Statement of the Case are contained in the Petition for Writ of Certiorari.

ARGUMENT

1. The Company Is not Engaged in Interstate Commerce Within the Meaning of the National Labor Relations Act, and the Labor Dispute at Issue Had No Actual or Potential Impact Upon Interstate Commerce and Did Not, or Should Not, Substantially Affect or Obstruct Interstate Commerce so as to Give Jurisdiction to the National Labor Relations Board in Effectuation of the Purposes and Policies of the Act.

It will be readily observed from the facts set forth in the petition above that there is here involved purely a local business not tied to or affecting interstate commerce.

The grant of power to the National Labor Relations Board by Congress in the National Labor Relations Act is substantially narrower than Congress' plenary control of interstate commerce as granted in the Constitution of the United States. Section 1 and 2 (6), of the Act (see Appendix attached hereto) set forth its purposes and policies as intending to prevent substantial burdens and obstructions to the free flow of commerce. Absent the existence or likelihood of a substantial burden or obstruction to the free flow of commerce in a given case, the National Labor Relations Board has no jurisdiction over that case. The existence or likelihood of a substantial burden or obstruction to interstate commerce is the jurisdictional requisite to any action by the National Labor Relations Board. *National Labor Relations Board vs. Baltimore Transit Company,* C.C.A. 4, 140 F. (2d) 51; *National Labor Relations Board vs. Jones and Laughlin Steel Corp.,* 301 U. S. 1, 41, 81 L.Ed. 893, 914, 57 S. Ct. 615. This court, in the Jones and Laughlin case, *supra,* said with reference to the grant of jurisdiction by the Act.

> "It purports to reach only what may be deemed to burden or obstruct that commerce and, thus qualified, it must be construed as contemplating the exercise of

> control within constitutional bounds. It is a familiar principle that Acts which directly burden or obstruct interstate or foreign commerce, or its free flow, are within the reach of the Congressional power."

In the case at hand there was no finding of, nor does the Record reveal, an actual or potential burden or obstruction on interstate commerce; nor was there even a finding of, nor does the evidence reveal, an impact upon the Company's branches not involved in the dispute. *National Labor Relations Board, Petitioner, vs. Shawnee Milling Company, d/b/a Paul's Valley Milling Company, Respondent,* 184 F (2) 57.

The Circuit Court of Appeals recognized this in that it restricted to the Ypsilanti branch alone the Board's power to issue an order, stating:

> " * * * the extension of this drastic order to branches of Respondent's business in no way involved in these proceedings was not justified. * * * The Board is not authorized to issue a cease and desist order covering activities in an area not embraced in the charge, and in an area where there is no evidence of violation of the statute."

2. The Assertion of Jurisdiction by the National Labor Relations Board Over an Employer Through the Application of Abritrary Jurisdictional Criteria without an Examination and Consideration of the Facts of the Case Before It Is Arbitrary and Capricious and an Abuse of Discretion.

In deciding whether or not it can assert jurisdiction the Board must ask itself and answer this question, which is the keystone of the entire jurisdictional issue: "Would this probable or threatened labor dispute have a substantial and significant impact upon interstate commerce?" *National Labor Relations Board vs. Vulcan Forging Company,* 188 F. (2d) 927; *Pueblo Gas and Fuel Company vs. National Labor Relations Board,* 118 F. (2d) 304; *National Labor Relations Board vs. J. L. Hudson Company,* 135 F. (2d) 380, certiorari denied 64 S. Ct. 40.

While an administrative agency may establish aids to the determination of the questions before it, the use of those aids as ends in themselves to the determination of

the questions, without an examination or consideration of all the relevant facts of the case before it, is arbitrary and capricious and an abuse of discretion. *Joliet Contractors Association, a non-profit Illinois corporation, for Itself and on Behalf of Its Members, et al., Petitioners, vs. National Labor Relations Board, Respondent,* 193 F. (2d) 833; *Local Union No. 12, Progressive Mine Workers of America, District No. 1, vs. National Labor Relations Board,* 189 F. (2d) 1, certiorari denied 72 S. Ct. 109, 342 U. S. 868, 96 L. Ed. 653; *National Labor Relations Board vs. Henry Levaur, Inc.,* 115 F. (2d) 105, certiorari denied 61 S. Ct. 550, 312 U. S. 682, 85 L. Ed. 1120.

The sole factor considered in the establishment of the "yardstick" applicable to the case at hand is dollar volume of the out-of-state purchases. [1]

Our Courts, including this Honorable Court, have repeatedly said that volume of business done by an enterprise is only one of the factors to be taken into consideration in the determination of whether that enterprise affects commerce within the meaning of the Act. *J. L. Brandeis and Sons vs. National Labor Relations Board,* 142 F. (2d) 977, certiorari denied 65 S. Ct. 85, 323 U. S. 751, rehearing denied 65 S. Ct. 129, 323 U. S. 815; *National Labor Relations Board vs. Fainblatt,* 59 S. Ct. 688, 306 U. S. 601, 307 U. S. 609, 83 L. Ed. 1014; *Southern Colorado Power Company vs. National Labor Relations Board,* 111 F. (2d) 539; *National Labor Relations Board vs. Townsend,* 185 F. (2d) 378, certiorari denied 71 S. Ct. 621, 341 U. S. 909, 95 L. Ed. 1346.

This Honorable Court, in *Santa Cruz Fruit Packing Company vs. National Labor Relations Board,* 303 U. S. 453, said, with reference to the adoption of mathematical jurisdictional formulae:

> "But such formulas are not provided by the great concepts of the Constitution, such as 'interstate commerce,' 'due process,' 'equal protection.' In maintaining the balance of the constitutional grants and limitations, it is inevitable that we should define their applications in the gradual process of inclusion and exclusion.
>
> There is thus no point in the instant case in a demand for the drawing of a mathematical line. And

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[1] *The Borden Company, Southern Division, vs. Amalgamated Meat Cutters and Butcher Workmen of North America, Local Union No. 103, AFL,* 91 NLRB 109.

what is reasonably clear in a particular application is not to be overborne by the simple and familiar dialectic of suggesting doubtful and extreme cases. The critical words of the provision of the National Labor Relations Act in dealing with the described labor practices are 'affecting commerce,' as defined in Sec. 2(6). It is plain that the provision cannot be applied by a mere reference to percentages and the fact that petitioner's sales in interstate and foreign commerce amounted to 37 per cent, and not to more than 50 per cent, of its production cannot be deemed controlling. The question that must be faced under the Act upon particular facts is whether the unfair labor practices involved have such a close and substantial relation to the freedom of interstate commerce from injurious restraint that these practices may constitutionally be made the subject of federal cognizance through provisions looking to the peaceable adjustment of labor disputes. * * *

Such questions cannot be escaped by the adoption of any artificial rule."

(a) The Board Cannot Retroactively Apply New Jurisdictional Criteria to Assert Jurisdiction Over an Employer with Regard to Events That Have Transpired when the Board's Avowed Policy Was to Refuse Jurisdiction Over that Employer, Particularly When the Employer Had Relied Upon the Prior Policy of the Board.

Prior to and at the time of the occurrence of the acts herein complained of, the Board had apparently adopted and followed a policy of not taking jurisdiction over businesses like the Company's in the absence of a franchise between that business and an interstate enterprise.[2]

---

2 Case No. 7-RC-581, decided October 8, 1949, *Nick Belling d/b/a Monroe Beer Distributors, employer and International Union of United Brewery, Flour, Cereal, Soft Drink & Distillery Workers of America, CIO;*

Virgil V. Voltz, d/b/a Golden Crust Bakery, 89 NLRB 117;

Lewis Bros. Bakery, Inc., 81 NLRB 190, and *Matter of Conlon Baking Co.*, 81 NLRB 142;

Hook Drugs, Inc., Retail, Wholesale and Department Store Union, CIO, 90 NLRB 249, Case No. 35-RC-354;

Paramount Sales Co., employer, and David F. Godin and Robert G. Luftman, petitioners, decided August 19, 1952, 90 NLRB 1901.

On October 5, 1950, however, and after the hearing before the Trial Examiner of the case at hand, the Board handed down five cases establishing new jurisdictional criteria, or "yardsticks."[3]

It applied one of these "yardsticks" retroactively to support its assumption of jurisdiction over this Company.[4]

This retroactive application of a new jurisdictional criterion was arbitrary, capricious and an abuse of discretion. *National Labor Relations Board vs. Guy F. Atkinson Co., et al.*, 195 F. (2d) 141. Even the Board has recognized this principle. *John Almeida, Jr., d/b/a Almeida Bus Service and Almeida Bus Lines, Inc., vs. Amalgamated Association of Street Electric Railway and Motor Coach Employees of America*, 99 NLRB 79.

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[3] *Hollow Tree Lumber Company, employer, and Lumber and Sawmill Workers Local Union No. 2975, chartered by U.B.C.J.A., AFL, petitioner, Case No. 20-RC-1017*, 91 NLRB 113;

Federal Dairy Co., Inc., Employer, and Bakery and Food Drivers, Warehousemen and Helpers Local Union No. 64, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, Case No. 1-RC-1546, 91 NLRB 107;

WBSR, Inc., Employer, and Electrical Workers Local Union No. 676, International Brotherhood of Electrical Workers, AFL, petitioner, Case No. 15-RC-387, 91 NLRB 110;

W. C. King, d/b/a Local Transit Lines, employer, and Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, AFL, petitioner, Case No. 10-RC-957, 91 NLRB 96;

The Borden Company, Southern Division, employer, and Amalgamated Meat Cutters & Butcher Workmen of North America, Local Union No. 103, AFL, petitioner Case No. 39-RC203, 91 NLRB 109;

Stanislaus Implement and Hardware Company, Limited, employer, and District Lodge No. 41, International Association of Machinists, petitioner, Case No. 20-RC-1068, 91 NLRB 116;

Dorn's House of Miracles, Inc., employer, and Broadcast Television Recording Engineers, Local Union 45, International Brotherhood of Electrical Workers, AFL, petitioner, Case No. 21-RC-1253, 91 NLRB 82;

The Rutledge Paper Products, Inc., employer, and International Brotherhood of Pulp, Sulphite and Paper Mill Workers of the U. S. & Canada, AFL, petitioner, Case No. 8-RC-923, 91 NLRB 115.

[4] The principles of these cases were published on October 6, 1950 by the National Labor Relations Board. Principle No. 6, as set forth, stated that the Board would take jurisdiction over an enterprise which has a direct inflow of material from out of state valued at $500,000 a year, on the basis of the Borden Company case, *Supra*.

3. When the Board's Jurisdiction to Issue Orders Is Confined to One of an Employer's Three Autonomous Branches, Then the Board Cannot Use the Volume of Business Done at Other Branches of the Employer Not Involved in the Issue As the Basis of Its Assumption of Jurisdiction Over the Single Branch Involved.

As set forth in the Facts in the Petition, *Supra,* the Petition for Recognition, the Charge, the Complaint and all of the evidence offered at the Hearing were directed solely to Company's Ypsilanti branch. The Circuit Court of Appeals recognized this in its modification of the order of the Board so as to confine it to the Ypsilanti branch alone. Both the Board and the Circuit Court of Appeals, however, inconsistently supported the Board's jurisdiction by amassing the Company's total volume of out-of-state purchases, including such purchases at the two branches not in any manner involved herein. This practice was frowned upon in *National Labor Relations Board vs. Shawnee Milling Company, d/b/a Paul's Valley Milling Company,* 184 F. (2d) 57, and *National Labor Relations vs. Santa Cruz Fruit Company,* 91 F. (2d) 790. Analogous to the Shawnee Milling Company case, *Supra,* there is nothing in the Record of the case at hand, or in the Facts, to indicate that a labor disturbance at Company's Ypsilanti branch would involve, affect or have an impact upon the Company's other two [illegible]. We therefore believe that the Board in its application of its mathematical "yardsticks" was limited to the volume of out-of-state purchases at the Ypsilanti branch alone, which was admittedly less than the $500,000 diacritical amount set forth in the "yardstick" applied.

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[5] The Court in this case said: "There is nothing in the record or in the stipulated facts which would warrant a finding that a labor disturbance in the Paul's Valley plant would have an impact upon the operations at the Shawnee plant, or that the discontinuance of operations at Paul's Valley would cast an undue burden upon the operations of the plant at Shawnee."

4. The Accepted and Usual Course of Judicial Procedure Assumes That a Court Discuss and Expressly Determine the Issues Placed Before It and, Except for Subjects of Judicial Notice, Base Its Decision Upon the Record, and a Departure From This Accepted and Usual Course of Procedure Justifies a Supervisory Review.

Cohen vs. Virginia, 6 Wheat, U. S. 264, 404;
Hansbrough vs. State of Indiana, 94 N. E. 2, 534; 228 Ind. 688, certiorari denied 340 U. S. 944, 71 S. Ct. 502, 95 L. Ed. 681;
Ex Parte Crane et al, 5 Pet. U. S. 190, 8 L. Ed. 92.

The very vital jurisdictional issues were sincerely and thoroughly raised at the outset of these proceedings before the Trial Examiner, again before the Board, and before the Circuit Court of Appeals, both in Brief and on Oral Argument. These issues were not discussed nor expressly determined by the Circuit Court of Appeals.

The Circuit Court of Appeals, in its Opinion, made the following statement:

> "On consideration of the Record as a whole we conclude that the principal findings of the Board are sustained by substantial evidence, elicited not only from witnesses for the Board, but also from Respondent's President and Petty, the Manager of the Ypsilanti branch."

If this statement in the Court's Opinion means that its Opinion is partially based upon the testimony of Petty, Manager of the Ypsilanti branch, then we believe the Court to be in error since Petty was never sworn and did not testify.

CONCLUSION

It is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

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APPENDIX

The relevant provision of the Constitution of the United States is as follows:

"ARTICLE I, Sec. 8.

The Congress shall have Power * * *

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; * * *."

The relevant provisions of the National Labor Relations Act, as amended, (29 U.S.C. 151, 49 Stat. 449, as amended, 29 U.S.C. 152, 49 Stat. 450, as amended) are as follows:

Findings and Policies

"Sec. 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) imparing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in

industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices, fudamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining, and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

"Sec. 2. * * *

(6) The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State

or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 786

JACK SMITH BEVERAGES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 262–265) is reported at 202 F. 2d 100. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 67–76) are reported at 94 N. L. R. B. 1401.

JURISDICTION

The judgment of the court below was entered on February 17, 1953 (R. 261). The petition for a writ of certiorari was filed on May 8, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254, and under Section 10 (e) of the National Labor Relations Act, as amended.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151, *et seq.*), are set forth in the petition, pp. 17–19.

QUESTIONS PRESENTED

1. Petitioner is a wholesale beverage distributor with warehouses in Jackson, Adrian, and Ypsilanti, Michigan. The three warehouses annually receive over $578,000 worth of beverages from outside the state, of which over $189,000 is shipped to the Ypsilanti branch, site of the unfair labor practices here involved. The first question presented (questions 1–3, Pet. 4) is whether the court below correctly held that the unfair labor practices "affected commerce" within the meaning of the National Labor Relations Act.

2. Whether the failure of the court below to discuss petitioner's contentions with respect to interstate commerce is a departure from "the accepted and usual course of judicial procedure" (Pet. 15) warranting review by this Court.[1]

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[1] Petitioner in its Questions Presented (Pet. 4; see also Pet. 15) directs attention to the statement of the court below that the Board's findings "are sustained by substantial evidence, elicited not only from witnesses for the Board but also from [petitioner's] president, Smith, and Petty, the manager of the Ypsilanti branch" (R. 263). Petitioner states (Pet. 4) that the reference to Petty in this context "seemingly makes reference to testimony not in the record" since Petty did not testify at the hearing, and that the decision below may therefore be partially based on testimony not in the record.

The record does contain a letter written by Petty (R. 53; 237) and testimony by various witnesses attributing certain statements

STATEMENT

The Board found that petitioner had violated Sections 8 (a) (1) and (2) of the Act by soliciting repudiations by its employees of membership in a labor organization which it opposed, and by actively sponsoring, dominating and contributing financial and other support to a labor organization it favored. The court below sustained the findings and conclusions of the Board. The petition does not question the propriety of the findings of the Board, as affirmed by the court below, with respect to the commission of unfair labor practices; accordingly, the facts upon which these findings were based will not be repeated here. The petition challenges only the assertion by the Board of jurisdiction over petitioner's business. The facts pertaining to petitioner's business operations are as follows:

Petitioner is a wholesale distributor of beer, ale, and wine with a principal office at Jackson, Michigan, and branch offices and warehouses at Adrian and Ypsilanti, Michigan (R. 48; 82–83). Each office has a manager, but all are under the active supervision and control of petitioner's president and treasurer, Jack Smith, who establishes common business and

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and acts to Petty in connection with the alleged unfair labor practices on which the Board relied in support of its findings (R. 53–54, 57; 127, 203, 216–217). If the court below inadvertently meant that Petty himself had testified, it misspoke. But the error is harmless and presents no question for review, for the court's opinion leaves no room for doubt that, quite apart from any testimony which it may have inadvertently attributed to Petty, the record contains ample evidence to support the Board's findings; and, indeed, petitioner does not contend otherwise.

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labor policies for all three branches (R. 50–51; 82, 109, 122, 153, 155, 177). Under this centralized management, supplies are frequently transferred from one branch to another as the need arises (R. 94).

While petitioner distributes its products solely to retail customers within the State of Michigan, a substantial amount of its merchandise is purchased from other states. Thus, in the year 1949, when the unfair labor practices in this case occurred, of a total of $1,835,644.04 expended by petitioner in purchases of products for its three branches, over $578,000, or 31.5 percent of the full amount, represented the value of bottled beverages obtained from sources outside Michigan (R. 48; 83). In that year the Ypsilanti branch, scene of the unfair labor practices here involved, received out-of-state goods in the amount of $189,265.95, representing 32.1 percent of the total purchases for that branch (R. 50; 93–94).

Shipments of these goods to petitioner's warehouses are made by rail, trucking lines, and petitioner's own trucks (R. 85, 98, 101). Thus, while merchandise from distant points is brought in by train carload, shorter hauls of goods are normally made by independent trucking companies and by petitioner's drivers, who make regular trips in its own trucks, ranging from twice a week to once every two weeks, to St. Louis, Missouri, and to South Bend, Fort Wayne and Terre Haute, Indiana (R. 84–88, 101). All of petitioner's purchases are made on an order to order basis; it has no franchise or other written agreement with its suppliers (R. 49; 91, 99–100).

On the basis of the foregoing facts, the Board concluded that petitioner was "engaged in commerce within the meaning of the Act and that it will effectuate the policies of the Act to assert jurisdiction over it" (R. 68). In granting enforcement of the Board's order insofar as it related to the Ypsilanti branch, the court below affirmed the Board's conclusion with respect to jurisdiction (R. 262–265).[2]

ARGUMENT

Contrary to petitioner's contention "that there is here involved purely a local business not tied to or affecting interstate commerce" (Pet. 9), it is manifest that labor unrest hindering petitioner's operations would have an adverse effect on annual interstate shipments to its three plants in excess of $500,000. An impact of this magnitude on interstate commerce unquestionably establishes petitioner's amenability to the Act. *National Labor Relations Board* v. *Denver Building and Construction Trades Council*, 341 U. S. 675, 683–685; *Local 74, United Brotherhood of Carpenters and Joiners* v. *National Labor Relations Board*, 341 U. S. 707, 712; *National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601, 607.[3]

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[2] The Board's order directed petitioner to cease and desist from its unfair labor practices and to disestablish the dominated union at each of the three locations in which it does business (R. 73–74). The court below modified the order by limiting its scope to the Ypsilanti branch (R. 264). The Board does not seek review of this modification.

[3] Petitioner is mistaken in its assertion that the Board's jurisdiction "is substantially narrower than Congress' plenary control of interstate commerce" (Pet. 9). It was "the intention of Congress to exercise whatever power is constitutionally given to it to

Petitioner contends, however, that its interstate operations should be measured for purposes of this case by its activities at its Ypsilanti plant alone, to which the Board's order is now restricted (see note 2, *supra*), and not by the volume of business conducted at all three of its plants. There are two ready answers to this argument. In the first place, since petitioner's wholesale liquor business is centrally controlled and operated and has a common labor policy applied to all three branches (*supra*, pp. 3–4), the Board properly considered the totality of petitioner's interstate operations in determining to exercise its jurisdiction. *Virginia Electric & Power Co.* v. *National Labor Relations Board*, 115 F. 2d 414, 415–416 (C. A. 4), affirmed on this point, 314 U. S. 469, 476; *National Labor Relations Board* v. *Weyerhauser Timber Co.*, 132 F. 2d 234, 235 (C. A. 9). Cf. *Polish National Alliance* v. *National Labor Relations Board*, 322 U. S. 643, 648; *National Labor Relations Board* v. *Denver Building Trades Council*, 341 U. S. 675, 685.*

regulate commerce by the adoption of measures for the prevention or control of * * * unfair labor practices * * *." *National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601, 607. See also, *Polish National Alliance* v. *National Labor Relations Board*, 322 U. S. 643, 647.

* *National Labor Relations Board* v. *Shawnee Milling Co.*, 184 F. 2d 57 (C. A. 10), relied upon by petitioner, is not to the contrary. There the court held that the Board did not have jurisdiction over a wholly intrastate business which the employer "operate[d as one of] two [different] businesses, wholly separate and apart—one engaged in interstate business and the other in intrastate operations * * *." 184 F. 2d at 59. The court recognized, however, that the amenability to the Act of an employer should be determined by the total effect on commerce of all his branches of operations where, as here, "the unit under considera-

Secondly, even if the impact on commerce of petitioner's operations at its Ypsilanti branch alone were considered, the Board had power to determine the merits of this case, for in the year the unfair labor practices were committed that branch received shipments from out of state in the amount of $189,265.95. Compare *National Labor Relations Board* v. *Denver Building Trades Council*, 341 U. S. 675, 683–685; *Local 74, United Brotherhood of Carpenters and Joiners* v. *National Labor Relations Board*, 341 U. S. 707, 712.

Given the decisive fact that petitioner's operations manifestly affect commerce, there is no need to deal at length with petitioner's further contention (Pet. 10–12) that the Board is without authority to set administrative jurisdictional standards based on the dollar volume of interstate business affected in determining the cases in which its statutory power is to be exercised. The Board's power to set such standards, and to be guided by them in the exercise of its discretionary authority to assert its jurisdiction, has been approved by this Court. *National Labor Relations Board* v. *Denver Building Trades Council*, 341 U. S. 675, 683, 684, 685, n. 14.[5]

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tion was an integrated part of a general operation and * * * disturbance therein would affect commerce." *Ibid.*

[5] The cases relied upon by petitioner (Pet. 11) do not support its position that the Board may not be guided, in the exercise of its discretionary jurisdiction, by a pre-established standard with respect to the dollar volume of the business in question. Insofar as they hold that the reach of the Act does not depend on any particular volume of commerce affected, these cases deal only with the consideration by which the full extent of the Board's statutory power is determined, and not with the administrative criteria

Finally, petitioner contends that it was improper for the Board to assert jurisdiction in this case because petitioner "had acted in reliance upon the Board's previously established policy of not taking jurisdiction over its type of business * * * in the absence of a franchise between that business and an interstate enterprise" (Pet. 4, 12). The contention is without foundation. The Board has long asserted jurisdiction over wholesale distributors of liquor who made even less extensive out-of-state purchases than petitioner, irrespective of whether they had franchises from interstate firms. See, *e. g., Raleigh Distributing Co.*, 65 N. L. R. B. 1010, decided February 12, 1946; *Casteel Distributing Co.*, 76 N. L. R. B. 153, decided February 11, 1948; *Mutual Distributing Co.*, 81 N. L. R. B. 208, decided January 18, 1949; *Wirts Distributing Co.*, 82 N. L. R. B. 669, decided April 1, 1949; see also, *Peoria Wholesale Liquor Distributors Ass'n*, 74 N. L. R. B. 208, decided June 18, 1947. None of the Board cases relied upon by petitioner (Pet. 12, n. 2) holds that the absence of a franchise with a business engaged in interstate commerce would be sufficient to preclude the assertion of jurisdiction

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which the Board may adopt as prerequisites to its assertion of jurisdiction once the full impact on commerce has been measured. On the other hand, the two cases cited by petitioner which consider the Board's discretionary authority to decline jurisdiction make it plain that the dollar volume of the interstate business affected is of critical importance. *Joliet Contractors Association* v. *National Labor Relations Board*, 193 F. 2d 833, 838–840, 841 (C. A. 7); *Progressive Mine Workers of America, Local 12* v. *National Labor Relations Board*, 189 F. 2d 1, 3, 4 (C. A. 7), certiorari denied, 342 U. S. 868.

by the Board. Indeed, only one of these cases [6] considers the relevance of a franchise to the Board's jurisdictional policy, and inasmuch as the decision in that case was issued nearly a year after the commission of the unfair labor practices by petitioner, it is manifest that petitioner could not have "acted in reliance" upon such a jurisdictional policy, even if there were one. Accordingly, the asserted conflict with *National Labor Relations Board* v. *Guy F. Atkinson Co.*, 195 F. 2d 141 (C. A. 9), is nonexistent. For there the Board premised its finding of an unfair labor practice upon conduct of an employer engaged in the construction industry at a time when the Board followed its widely publicized policy of not asserting jurisdiction in that industry. The court denied enforcement of the Board's order, holding that the Board could not retroactively apply a reversal of its jurisdictional policy in that industry against "a respondent * * * who was unable to know, when it acted, that it was guilty of any conduct of which the Board would take cognizance." 195 F. 2d at 149. As we have shown, this case reveals neither a change of jurisdictional policy by the Board nor a showing by petitioner of reliance upon an assumed immunity from the Board's assertion of jurisdiction. Compare *National Labor Relations Board* v. *Kobritz*, 193 F. 2d 8, 12–13 (C. A. 1); *Progressive Mine Workers, Local No. 12* v. *National Labor Relations Board*, 189 F. 2d 1, 5 (C. A. 7), certiorari denied, 342 U. S. 868.

[6] *Paramount Sales Co.*, 90 N. L. R. B. 1901, decided August 15, 1950.

2. The court below expressly noted the extent of petitioner's interstate activities (R. 262–263). The failure of the court further to discuss petitioner's contentions with respect to interstate commerce indicates only that the court properly regarded them as not requiring further discussion. There is plainly no merit in the suggestion (Pet. 6–7, 15) that the court's failure to write a more elaborate opinion is in itself a reason for review by this Court.

CONCLUSION

The decision below is clearly correct, and presents no substantial question warranting review. No conflict of decisions is shown. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1953.

U. S. GOVERNMENT PRINTING OFFICE: 1953